

OCT 13 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff - Appellee,</p> <p>v.</p> <p>TERRY BRAY,</p> <p>Defendant - Appellant.</p>
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No. 08-50246

D.C. No. 2:07-cr-00685-ABC-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, Chief District Judge, Presiding

Submitted September 14, 2009**

Before: SILVERMAN, RAWLINSON and CLIFTON, Circuit Judges.

Terry Bray appeals from the conviction and 178-month sentence imposed following his guilty plea to distributing 5 grams or more of crack cocaine, in violation of 21 U.S.C. § 841(a)(1). We dismiss based on the valid appeal waiver.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Bray contends the appeal waiver in his plea agreement does not preclude this appeal of his sentence, which is unconstitutional because the government did not file an information under 21 U.S.C. § 851 stating its intent to increase the statutory maximum penalty. *See United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). This contention is foreclosed by *United States v. McDougherty*, 920 F.2d 569, 574 (9th Cir. 1990) (explaining that § 851 applies when government seeks to obtain increased penalties under § 841, but § 851 does not implicate career offender provision of the Guidelines because that provision does not increase statutory penalties). We therefore enforce the valid appeal waiver. *See United States v. Bibler*, 495 F.3d at 624.

DISMISSED.